



**ASIC**

Australian Securities & Investments Commission

# Recent changes to Australia's supervisory powers

*A speech by Belinda Gibson, Deputy Chairman  
Australian Securities and Investment Commission*

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Good afternoon

Thank you for your invitation to ASIC to speak here today.

Over the last 20 years I have observed ACLA grow from a nascent social network to a professional association of committed commercial lawyers with a clear and important role in our corporate sector and financial markets. The unique attribute of corporate lawyers is that you are generalists, you must know quite a lot about everything, and apply it in a commercial environment, usually in a very tight timeframe.

This is an attribute a Commissioner at ASIC needs.

## Overview

- ASIC's remit and functions
- Market supervision
- Continuous disclosure
- Market structure proposals

2

Today I would like to outline ASIC's remit and describe our approach to meeting that remit by function. I will demonstrate our approach by reference to one of the major new responsibilities we assumed last year, market supervision. I will take a brief foray into the continuous disclosure obligation issue which I know concerns many of you in listed entities, and close by referring you to the equity market structure paper we issued last week.

### ASIC's remit

ASIC has a very broad remit indeed, the largest remit of any securities organisation in our community of advanced economies that gather as the G20 today in Korea.

The following slide illustrates this point.

## ASIC's Remit: Comparison to our Peers

Regulatory Scope	ASIC	FSA UK	SEC US	SFC HK
Securities & Managed Investments	✓	✓	✓	✓
Corporate Fund Raising	✓	✓	✓	✓
Corporate Governance	✓	X	✓	X
Companies Registration	✓	X	X	X
Financial Reporting	✓	X	X	X
Markets Regulation	✓	✓	✓	✓
Credit	✓	✓	X	X
Prudential Regulation	X	✓	X	X
Money Laundering	X	✓	✓	✓

4

The ASIC Act gives us a very broad mandate. Section 1(2)(a) says 'ASIC must strive to maintain, facilitate and improve the performance of the financial system and the entities within that system ...'

We seek to implement this mandate by ensuring that our activities are directed to achieving at least one of our five market facing priorities. In brief, protecting retail investors and consumers, promoting confidence in the integrity of our markets, promoting international capital flows, dealing with the implications of the GFC and seeking to reduce the cost of doing business.

The benefits to the Australian financial system of protecting retail investors and consumers and reducing red tape are clear. The other priorities are also very important, and go to market structure. Australia is a relatively small part of the global economy. Our fortunes are tied to it. We work very hard to ensure our regulatory framework is broadly in line with that which applies in other advanced economies, where we must compete for capital.

## ASIC's functions

How do we approach our task? Personally I find it useful to consider our activities under the five functions set out on the following slide.

## ASIC's Functions

- Rule making
- Guidance for compliance
- Surveillance
- Enforcement
- Registry operations and data provision

5

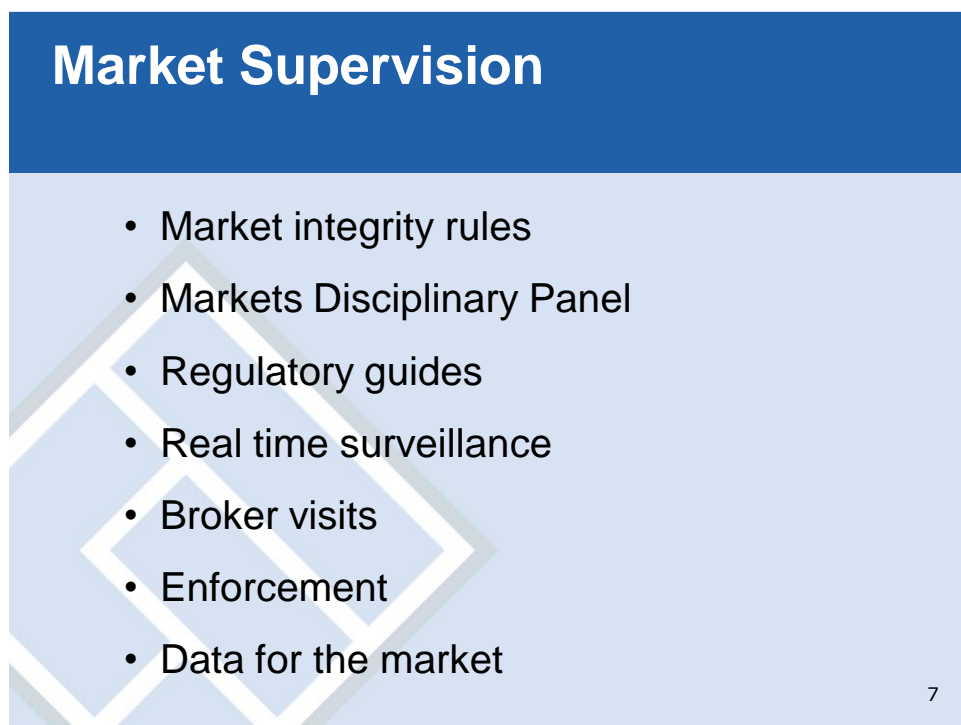
ASIC's specific regulatory responsibilities are far from static. In the last three years ASIC has been given responsibility for financial literacy, consumer credit from the States and Territories, direct market supervision from ASX, margin loan supervision and unfair contract legislation.

This of course is a selective list. As you can see, we do understand the burden of dealing with regulatory change, which you must grapple with. We too endeavour to deal with new regulatory responsibilities without disruption to our existing 'business as usual' activities.

I would like to illustrate our approach to regulation by reference to the new market supervision responsibility and, in so doing, describe the actions we take to bring the regulated community along with us.

Market supervision is very much directed to promoting confidence in the integrity of our markets. A lot of our work also aims to assist retail investors, particularly the requirements for disclosure in prospectuses and in statements of advice by financial advisers.

## Market supervision

A presentation slide with a blue header and a light blue background. The header contains the title 'Market Supervision' in white. Below the header is a list of seven bullet points. A large, faint, white diamond shape is overlaid on the background behind the list. The number '7' is in the bottom right corner.

### Market Supervision

- Market integrity rules
- Markets Disciplinary Panel
- Regulatory guides
- Real time surveillance
- Broker visits
- Enforcement
- Data for the market

7

In August 2009 then Minister Bowen announced that ASIC would take responsibility from the ASX for real time market supervision. That took effect on 1 August this year. Our objective was to ensure we provide market supervision to the same standard as ASX, and to look for the efficiencies that would follow from merging the two supervisory functions into one entity.

### The first function: Rule Making

Markets have two types of rules. One set of rules is designed to ensure integrity. Some are so important that breach is a criminal offence—insider trading, market manipulation and making false statements about financial products are cases in point. ASIC established dedicated markets offences enforcement teams in 2008. In that time we have procured seven convictions or guilty pleas for insider trading and six for market manipulation. We have banned eleven brokers for market misconduct. That is more than we achieved in the previous eight years.

Markets commonly impose additional integrity standards for their participants—they expand on manipulation definitions, and they make rules about how brokers interact with clients. It is these market integrity rules that ASIC has taken over. The ASX has kept the market operating rules that relate to the efficiency of trading—T+3 is a case in point.

In August we largely split the ASX rule book into integrity and efficiency rules to secure ease of transition. In the next few months we will consult on

enhancements to the Rules, in the context of introducing competition for ASX. I will come to that later.

The more novel element of rule making at transition is that we built a new framework for determining if there has been a breach of the Market Integrity Rules and the penalty to apply. The Markets Disciplinary Panel has this role and will issue infringement notices.

This is not the place to detail the Rules or Panel structure. The point I want to make is that we engaged in extensive consultation before the issue of the final Rules. We talked to the ASX, the industry bodies representing brokers and investors, specific industry participants and the public generally. That is our practice.

### **The second function: Guidance for Compliance**

To accompany the Rules we have issued two regulatory guides. These were preceded by consultation. This is our standard practice.

Our guidance is just that. It is a statement to the regulated community about how we will apply the law, and now our Market Integrity Rules. The guidance is not a rule in itself, but does exhort practices that will ensure compliance in ASIC's eyes. These are practices that establish a benchmark for proper conduct; a benchmark that properly emerges from consultation.

### **The third function: Surveillance**

With a law or a rule comes an observation function. Surveillance has many benefits beyond just detecting breaches that can be the subject of enforcement action. Surveillance gives us an understanding of the market and a better capacity to set standards. Surveillance of itself has a deterrent effect. Often surveillance activity leads to discussions about future (better) conduct, rather than enforcement for past breaches.

In the markets space we have two surveillance teams. The first operates the real time market supervision technology. We have nine people who monitor the screens of various information providers during trading hours. We have a SMARTS tool that will send us alerts when certain trading parameters are reached—anomalous prices or volumes, identified by stock or by broker. Our team assesses about 300 alerts a trading day to see if there is an indication of suspicious trading.

We monitor information in the marketplace against this trading data—information on the ASX Company Announcements Platform, in the traditional news media and also on the social media sites. I will come back to this later in the context of continuous disclosure.

The second surveillance team is concerned with broker conduct and compliance. We visit brokers regularly—we have met with 16 since 1 August and had telephone discussions with 20 more regarding issues of concern to us. We respond to specific breach referrals and to complaints. We are engaging with brokers now in that regard. We also conduct thematic reviews of the industry. Current focuses are automatic order processing and unauthorised trading on a client's account. Surveillance and compliance visits generally have an open dialogue format and should be constructive. We want to encourage better behaviour.

### **The fourth function: Enforcement**

Of course some surveillances expose breaches that require enforcement activity. A prompt is not always a sufficient deterrent.

We have a wide range of enforcement alternatives for markets breaches, all of which can be brought before a court in some way or other. The most egregious integrity breaches attract criminal penalties, and I have outlined our achievements in that area earlier. For the Market Integrity Rules there can be civil penalties, bannings, training impositions and restitution of loss orders. The Markets Disciplinary Panel can issue infringement notices with the same type of penalties, though for a lesser sum.

One of the specialist deterrence teams has also taken on enforcement of breaches of the Market Integrity Rules, which will ordinarily go to the Markets Disciplinary Panel. They are already dealing with nine referrals for potential breaches of the Corporations Act or Market Integrity Rules since 1 August. One benefit of ASIC taking on market supervision is that suspected breaches move from the surveillance world to deterrence much more quickly than when ASX had surveillance and passed the case to us for enforcement.

### **The fifth function: Data**

An important element of ASIC's activities is to provide information to the market. The ASX remains the most important source of current information on listed entities. Of course our ASCOT database has a considerable amount of valuable statutory information.

Another new initiative for 2010 was the introduction of an ASIC platform for short sellers to advise their net short position. We report the aggregate net short position of stocks daily, on a T+3 basis. This enables investors to assess the exposure of a stock to the market vagaries we saw at the height of the GFC. It is also a statement of market sentiment.

## Continuous disclosure

### Continuous Disclosure

- ASIC monitors for continuous disclosure
- When information is no longer confidential then it must be disclosed immediately
- ASIC encourages companies to work harder to maintain confidentiality of their information

8

I would like now to turn to the continuous disclosure dilemma all of you in the listed entity space must deal with. Before joining ASIC I was an adviser to listed entities. I know the question of when to disclose is very difficult. I know that disclosure can damage the underlying deal. Against this, the reputation for integrity of our market is critical to attracting capital. If investors believe that people 'in the know' can profit ahead of others, or can manipulate trading by parlaying information, the whole market is damaged.

I am often asked what ASIC says 'immediately' means in the context of continuous disclosure. Listing Rule 3.1 requires disclosure immediately a company has market sensitive information, unless one of the carve outs in the Listing Rules apply.

Can I talk about immediate disclosure once there is a leak. Entities should be quick to ensure the whole market knows about a deal once it seems some of the market knows. Confidentiality is lost and the exceptions to disclose do not apply.

Clearly a company does need a reasonable time to formulate a sensible and not misleading announcement to the market. What is a reasonable time will depend on the circumstances, but will be measured in portions of an hour, not many hours plural, to give a range. This is evident from some of the infringement notices we have issued. We would want to see urgency given to addressing a disclosure once there has been a leak, however reported to the




market. The entity must announce the position itself or to go into a trading halt if that is not possible.

One incident of our assuming real time market supervision responsibilities is that we can now associate specific market trading with the impending deals we are aware of because one of our stakeholder teams is dealing with relief applications for the deal. We do monitor trading in stocks of entities that have anticipated deals. As I said earlier, we also monitor the media for its publication of information. ASX still has primary responsibility for supervising continuous disclosure but you will see ASIC take a more active role now. We will telephone entities directly if we think there has been a leak, evident from media coverage or possibly just really abnormal trading. For this reason, I encourage you to also monitor trading in your stocks.

Last month the Chartered Secretaries Association and Australian Investor Relations Association released 'Handling Confidential Price Sensitive Information: Principles for Good Practice'. It sets some principles to enable entities to better manage the confidentiality of their information, and therefore enables the disclosure of that information to the market at the time of their choosing. I commend those principles to all of you.

## Market structure

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### Market Structure

- Trading of ASX securities on multiple platforms
- Algorithmic trading and the flash crash
- Please engage with this discussion

7

The change of supervision responsibility was a pre condition to the introduction of a competitor market to ASX for ASX listed equity securities.

Last week we issued a very detailed consultation paper on equity market structure. It discusses the proposed introduction of competition for market services, specifically the licensing of new platforms to quote stocks already traded on the ASX. We seek comment on the proper regulatory framework for an equities market that is now highly technology driven. The 'flash crash' in the US of 6 May exposed the fragility of a system which largely operates via programmed dialogue between computers. Computer trading is a natural part of technological evolution and it is already present in Australia. However, the introduction of multiple trading platforms for stocks will likely exacerbate the issue.

The consultation paper is of very direct concern to brokers and investors. I encourage those of you who represent listed entities to also engage with the issues the paper raises. It is your securities that are traded on these markets. With the introduction of competition, the cost of issuing capital should go down, facilitating business investment. There should be less market price volatility in the ordinary course, but 6 May events cannot be ruled out. Your share register will be less static, and your pool of shareholders may change more rapidly than is currently the case. You are likely to have less visibility of your ultimate shareholders.

The paper is long and technical, but raises very important issues for the future of our capital markets.

## Conclusion

What I've focused on today is a fairly detailed explanation of one of the most recent changes to ASIC's supervisory powers to demonstrate ASIC's functional approach to regulation.

We've approached our new market supervision responsibilities with a view to minimising disruption to the markets. We've consulted every step of the way and have been mindful of the regulatory impact on business.

I believe we have handled the transition well.

Going forward, you will see ASIC being more active in the continuous disclosure area, with an ongoing surveillance program comparing trading against information we have at ASIC, and that in the market. We are consulting on the introduction of competition for market services which could considerably impact the structure of our equity market, and I commend that paper to you.

One of our key strategic priorities is improving the integrity of Australia's capital markets and this will continue to be a high priority for ASIC into the future.